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C O N F I D E N T I A L SECTION 01 OF 04 MANILA 002163

SIPDIS

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TAGS: [PREL](#) [MARR](#) [KCRM](#) [CASC](#) [RP](#)
SUBJECT: MARINE CASE UPDATE: SUPREME COURT TO HEAR CUSTODY
ARGUMENTS

REF: A. 2007 MANILA 4015 (APPEALS COURT DECISION NO
LATER THAN OCTOBER 2008)
[1](#)B. 2007 MANILA 3166 (CASE OF U.S. MARINE LCPL SMITH)
[1](#)C. 2006 MANILA 4880 (VERDICTS IN ALLEGED RAPE CASE)

Classified By: Ambassador Kristie A. Kenney
for reasons 1.4 (b) and (d)

[1](#)1. (C) SUMMARY. The case of U.S. Marine LCpl Daniel Smith, whom a trial court found guilty of rape, remains under appeal. Separate from the substance of the case, the Supreme Court is set to hear oral arguments September 19 regarding whether the Philippine government erred in transferring custody of Smith to U.S. facilities after the trial court found him guilty. There are indications that oral arguments could turn into a broader discussion of the Embassy's agreement with the Department of Foreign Affairs on Smith's custody, the constitutionality of the Visiting Forces Agreement itself, and the presence of U.S. military personnel on Philippine soil. A decision by the Supreme Court will likely take several months. We are concerned that the oral arguments will be used by opponents of the U.S.-Philippine mil-mil relationship to demonstrate and attract media attention to their cause. RSO has sought and received additional police protection for USG facilities. The Ambassador and country team have continuously pressed for a just and rapid resolution of the case with the most senior officials of the Philippine government, while the Embassy has provided continuous support for Smith over the last two and a half years. END SUMMARY.

SMITH STILL ON CHANCERY GROUNDS

[1](#)2. (U) Lance Corporal Daniel J. Smith remains in U.S. custody on the Chancery grounds and continues to receive regular visits from his Philippine pastors and lawyers. He is in good physical condition and follows a daily exercise routine. A III Marine Expeditionary Force (III MEF) psychiatrist paid Smith a routine visit last fall, finding him in good spirits. Smith's parents are scheduled to visit him September 29 through October 7. Philippine government officials, including Department of Interior and Local Government (DILG) Undersecretary Marius Corpus, continue to visit Smith to verify on behalf of the Philippine government that Smith remains in the Philippines, the latest such visit taking place September 12. Given that the DILG has jurisdiction over the prison system, Corpus was tasked by the Philippine government with ensuring Smith was still in the Philippines.

COURT OF APPEALS CASE STALLED

[1](#)3. (C) Smith's criminal case has not moved since October 15,

2007, when the Court of Appeals deemed the case officially "submitted for resolution," indicating that the trial court had transferred the complete record to the Court of Appeals, the parties had filed all necessary pleadings, and the Court of Appeals had selected the three judge panel that would decide the case. According to the Philippine Constitution "all cases or matters filed (under) this Constitution must be decided or resolved within twenty-four months from date of submission for the Supreme Court, and, unless reduced by the Supreme Court, twelve months for all lower collegiate courts." Thus, according to the aforementioned Constitutional provision, the case should be resolved by October 15, 2008. However, the head of the original three-judge panel assigned to the case retired in July, and a new panel has yet to be appointed, making it unlikely that a decision will be forthcoming in the four weeks until October 15. According to various attorneys the Embassy has consulted, there is no penalty imposed if the court fails to act by October 15.

SUPREME COURT TO ADDRESS CUSTODY

14. (C) Separately, the Philippine Supreme Court will be hearing oral arguments September 19 on a civil petition that alleges that the Philippine government erred in turning Smith over to the custody of the U.S. after the trial court found him guilty and ordered that he be turned over to Philippine authorities. The Solicitor General, who will argue the case before the Supreme Court, told us September 8 that "activist" members of the Supreme Court, including Chief Justice Puno,

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supported ruling against the constitutionality of parts of the Visiting Forces Agreement (VFA) and ordering the Philippine government to request custody of Smith. In a 2000 case that affirmed the constitutionality of the VFA, then-Associate Justice Puno wrote the dissenting opinion and was joined by four other justices.

15. (C) The Solicitor General expects that the oral argument will turn into a broader discussion of the Embassy's agreement with the Department of Foreign Affairs on Smith's custody, the constitutionality of the VFA itself, and the presence of U.S. military personnel on Philippine soil. The Solicitor General believes that if the Supreme Court rules against the VFA and orders Smith to be returned to Philippine custody, the government would have to comply. Still, a Supreme Court decision could take several months to be issued. The head of the legal division at the Department of Foreign Affairs told us September 9 that in case of a decision against the VFA and an order to request custody of Smith, the government would immediately file a motion for reconsideration, which would effectively push back the time for decision by several more months.

EMBASSY PROVIDES SIGNIFICANT SUPPORT

16. (C) As provided by the Visiting Forces Agreement, Smith has been in U.S. custody since his arrest in November 2005. Except for the three-week period immediately following the verdict, Smith has remained on Chancery grounds and in U.S. custody since that time. Representatives from III MEF have supervised him at all times, and the Regional Security Office has spent significant time and resources ensuring Smith's safety and security, including during Smith's appearances in court and during Smith's hospital visits for minor medical procedures. American Citizen Services officers, who attended all trial sessions, also have kept close watch over the case, liaising with Smith's family and ensuring Smith's rights as a U.S. citizen are respected. The case excited public passion from the start, and Public Affairs Office continues to field numerous inquiries from the media and has been successful in

directing public attention toward the judicial process and away from broader issues of U.S.-Philippine relations. The DCM also chairs a weekly meeting of Mission and PACOM representatives to ensure proper coordination and appropriate support to Smith.

PUSHING ON THE DIPLOMATIC FRONT

17. (C) Throughout this long period of Smith's trial and custody, the Ambassador has regularly pressed Smith's case at the most senior levels of the Philippine government, urging a just and rapid resolution to this long-running and ambiguous situation. In numerous meetings with key government officials, she has stressed that the U.S. has strictly adhered to the spirit and letter of the Visiting Forces Agreement, and Smith has remained in custody on Embassy grounds at significant cost to the U.S. government. She has stressed that it is similarly incumbent on the Philippine government to adhere to its obligations under the VFA. As the Smith case continues its course, the Ambassador and other Embassy officials have underscored that it is up to the Philippine government to move rapidly and fairly to ensure a legitimate and dignified outcome to this long and difficult ordeal. In the last few weeks, the Ambassador has been in regular contact with key government officials, including the Foreign Secretary, Executive Secretary, National Security Advisor, Secretary of the Interior and Local Government, Secretary of National Defense, and others. Senior Mission officers have also reached out to other Department of Foreign Affairs officials, and the Solicitor General.

PREPARING FOR DEMONSTRATIONS

18. (C) Based on past experience with the case, the Mission is preparing, in connection with the Supreme Court hearing, for large, potentially volatile demonstrations by a variety of leftist and anti-U.S. groups, including Task Force Subic Rape, Gabriela, and the League of Filipino Students. In the last week, there have been several small demonstrations near the Chancery, and more demonstrations are planned for September 16, and 19. The Regional Security Officer will coordinate with the Philippine National Police Civil

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Disturbance Management and Intelligence to provide robust support to deal with the demonstrators. The RSO could recommend temporarily closing or "sealing" the Chancery gates should the demonstrations become violent or unruly.

ADDRESSING THE MEDIA

19. (C) The Smith case was, statistically, the most reported story in the Philippines in 2006, garnering front-page space nearly every day during the trial. Based on this track record, the Mission anticipates and is prepared for a barrage of inquiries from the media upon issuance of the Supreme Court decision. The Embassy's press guidance addressing the Supreme Court hearing is contained in para 10. The Embassy will refer all questions regarding Smith's legal status to his attorney, while questions regarding his custody will be referred to the Philippine government.

EMBASSY GUIDANCE FOR SUPREME COURT HEARING

10. (U) The Embassy's guidance follows:

U.S. Embassy Manila, September 15, 2008

Supreme Court Hearing on Custody of LCpl Smith

Q: What is your reaction to the hearing?

-- I think it would be inappropriate for me to offer an opinion on the legal decisions of the Philippine judicial system.

(If pressed)

-- The hearing is related to a civil matter pending before the Philippine Supreme Court. It is separate from the criminal case against LCpl Smith, which is still in the appeals process.

-- This is a very difficult and emotional case for all those involved, but LCpl Smith remains in U.S. custody in accordance with the VFA. He is still in custody while his appeals process is going on.

Q: If (insert complicated legal question here), will the U.S. government agree?

-- Again, this is an issue pending before the Philippine judicial system. It would be inappropriate for me to opine. It has been our firm objective throughout this case to see that justice is served. To that end, we have adhered to the VFA. We will continue to do so.

Q: What is the latest in the Smith case? We have heard that the appeals court will soon issue a decision upholding or reversing his conviction . . .

-- Refer you to his lawyer for updates on the criminal case.

(If hearing results in some kind of negative decision)

Q: What is the reaction to the decision declaring the VFA unconstitutional? Does the VFA need to be renegotiated? Will the U.S. Government agree to do that?

-- The VFA provides the sole framework for U.S.-Philippine cooperation on legal cases involving visiting U.S. military personnel. Such an agreement is indispensable for continuing almost every kind of military cooperation between our two countries.

-- The VFA has served the security cooperation between our two countries and we will continue to abide by its terms.

Q: Will the U.S. agree to transfer LCpl Smith to Philippine authorities?

-- Consistent with the terms of the Visiting Forces Agreement (VFA), Smith will remain in U.S. government custody until all judicial proceedings have been completed.

Q: Will the U.S. withdraw military personnel from the Philippines as a result of the Supreme Court decision?

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-- U.S. military personnel are here at the invitation of the Philippine government to provide assistance and share information with the AFP.

-- All temporarily deployed U.S. forces respect the sovereignty of the Republic of the Philippines and fully comply with the Visiting Forces Agreement (VFA).

-- We will continue to abide by the terms of the VFA.

Q: How do you react to the demonstrations that have taken place in front of the Embassy and elsewhere?

-- Peaceful protests are a normal part of a vibrant democracy

that respects the right of free speech.

-- However, violence has no place in political protest, nor does destruction of public or private property.

-- (For use as appropriate) Moreover, the public and diplomats have a right to come and go safely and freely from the Embassy grounds, and protesters have no right to prevent that.

COMMENT

¶11. (C) While the Supreme Court previously found the Visiting Forces Agreement (VFA) constitutional and the upcoming hearing should be a straightforward revalidation of the fact that the U.S. has the right to keep Smith until all appeals are completed, a confluence of events has led certain groups to use the case as a broader attack on the constitutionality of the VFA. First, this comes at a difficult time for the Philippine government. Facing significant setbacks in the peace process and the outbreak of violence in Mindanao, the government is in a weaker position than usual to work with the U.S. government to reach a mutually agreeable solution to the Smith case. Secondly, the Supreme Court recently has shown an inclination for engaging in more politically charged issues, as evidenced by its decision to issue a restraining order on the Memorandum of Agreement on territory between the Philippine government and the Moro Islamic Liberation Front. Thirdly, while in the past it was accepted wisdom that the government could count on 9 of the 15 justices on the Supreme Court, that may no longer be the case. The government fought the restraining order on the Memorandum of Agreement on territory and lost the case 15 to 0. Finally, Chief Justice Puno's dissent on a previous case affirming the constitutionality of the VFA does not augur well for a similar finding. Given the strong reaction by Philippine society to the Smith case, it is not inconceivable that the Supreme Court may in some months order the Philippine government to request custody of Smith. We will remain firm that the government-government VFA explicitly provides for custody to remain with the U.S. until the completion of all judicial proceedings.

KENNEY